




Legislation on Administrative Offenses

Endless Reform Attempts and Successful Strategic Litigation





Responsible for publishing: **Nona Kurdovanizde**

Editor: **Khatuna Kviralashvili**

Designer: **Nino Gagua**



The project is made possible by the generous support of the American People through the United States Agency for International Development (USAID). The contents are the responsibility of Georgian Young Lawyers 'Association and do not necessarily reflect the views of USAID, the United States Government or EWMI.



USAID
FROM THE AMERICAN PEOPLE

EAST • WEST
MANAGEMENT
INSTITUTE
*Promoting Rule of Law
in Georgia (PROLoG)*

Introduction

The Code of Administrative Offences still in effect in Georgia is a heavy legacy from the Soviet period, which is used to justify violations of human rights. The Code, adopted in 1984, fails to meet the requirements of a fair trial, envisages severe penalties, including administrative detention or imprisonment for specific violations, and provides much fewer procedural guarantees compared to a person accused of committing a criminal offense; the Code does not meet the requirements of the presumption of innocence; it does not require the judge to be guided by a standard beyond a reasonable doubt, and the procedures for reviewing cases and applying sanctions do not ensure effective representation. Consequently, the application of the Code in the present form brings about violations of fundamental human rights and international obligations of Georgia on a daily basis.

The Georgian Young Lawyers' Association (hereinafter the GYLA), has been advocating and demanding to reform the administrative offenses law for years. Numerous cases of human rights violations resulting from the application of the Code over the years have been documented in the reports presented by GYLA, other local and international organizations, as well as the Public Defender.¹ In response to thereof, the state has recognized the need for reform, however, so far we can recall only unsuccessful attempts to change the Code. The government merely declaratively expresses the readiness to reform and does not take any effective steps to change it.



Recent efforts to implement the reform

In recent years, the government has twice started working on the reform of administrative offenses legislation, yet in both cases, the processes were halted without even submitting draft bills to the parliament.

¹ For example: A. GYLA's report "Beyond the Missing Eye (Legal assessment of the June 20-21 Events)," available at - <https://bit.ly/3ainrPo> [Last viewed: 05.02.2021]. B. The joint opinion submitted by GYLA and the European Center for Human Rights (EHRAC) to the Committee of Ministers on the so-called Tsintsabadze Group Cases, available at - <https://bit.ly/2PtXPm8> [Last viewed: 05.02.2021]. C. Joint Report of GYLA and EMC - "May 12 - Large-Scale Police Operation in Tbilisi clubs", available at - <https://bit.ly/2Qhr80h> [Last viewed: 05.02.2021]. D. Public Defender of Georgia Report on the Situation of Human Rights and Freedoms in Georgia in 2017; E. GYLA's report - "Protest Considered an Offence", available at - <https://gyla.ge/files/news/2008/geo.pdf> [Last viewed: 05.02.2021]. F. Assessment and recommendations by Thomas Hammarberg, pg.11-12; 2013. Available at <https://bit.ly/3oMT1dj> [Last viewed: 05.02.2021]. G. Human Rights Watch, Administrative Error: Georgia's Flawed System of Administrative Justice (January 2013, available at - <https://bit.ly/3jmv4Z9> [last viewed: 05.02.2021]. H. GYLA's report "May 26", 2011. Available at - <https://bit.ly/2N7SoJU> [Last viewed: 05.02.2021].



Draft developed by the Government Commission

With the view to supporting the reform of the administrative offenses law, the Government of Georgia, based on the Decree №1981 of November 3, 2014, set up a Government Commission to develop a draft reform.

According to the reform model elaborated by the Government Commission:

- A new category of offenses – “minor crime”- is added to the Criminal Code. This category includes misdemeanors that, due to their criminal nature, are referred from the Administrative Offenses Code to the Criminal Code (for example, petty hooliganism, resistance to a lawful demand of the police). Furthermore, committing a minor crime will no longer result in a person being convicted;
- Offenses in the category of minor crimes are subject to the procedures of criminal proceedings (prosecuted by the Prosecutor’s Office) to ensure a higher standard of proof and procedural guarantees;
- For the violations that fall within the Code of Administrative Offenses, the administrative proceedings are carried out by administrative bodies in accordance with the subject-matter jurisdiction. Decisions delivered by administrative bodies are subject to full judicial scrutiny according to the standards of a due trial;
- Administrative imprisonment, as a form of punishment for administrative offenses, is abolished;
- The institute of administrative detention is revoked. Instead, administrative placement not exceeding 8 hours is provided as a measure to secure administrative proceedings. Restriction of liberty should end as soon as the grounds for administrative imprisonment are exhausted;
- Imprisonment as a measure of restraint no longer shall be imposed as a measure of restraint for a minor category of crimes, except in cases expressly stipulated in the Code.

GYLA was a member of the Government Commission and therefore participated in the discussions and debates aimed at developing the reform. GYLA substantially supports the approach of the Government Commission as an alternative way of reforming the legislation on administrative offenses and believes that the reform draft is essentially in line with international standards.



Draft developed by the Ministry of Internal Affairs

On January 16, 2019, the Ministry of Internal Affairs of Georgia announced the commencement of work on the reform of the Code of Administrative Offenses, which was supposed to be completed by July 2019 with the elaboration of a draft law. As is known, the Ministry of Internal Affairs completed the work on the project in June 2019, yet the draft has not been presented to the interested parties so far. Thus, it remains unknown what model of reform of the administrative offenses legislation has been envisioned in the draft developed by the Ministry of Internal Affairs.

Strategic litigation in the Constitutional Court

In parallel with the advocacy campaign for the reform, GYLA initiated strategic litigation in the Constitutional Court in 2016 in an attempt to change the unconstitutional application of the Code of Administrative Offenses. As of February 2021, GYLA has filed 12 complaints with the Constitutional Court concerning specific articles of the Administrative Offenses Code. Seven of them have been successfully finalized, and five lawsuits are under consideration.

What changes has the GYLA's strategic litigation brought?

The strategic litigation conducted by GYLA has further highlighted the fundamental shortcomings of the Administrative Offenses Code of Georgia. The cases successfully litigated in the Constitutional Court have significantly expanded the areas protected by human rights. In particular, the procedural rights of persons accused of an administrative offense have improved - it is now possible to appeal to the Court of Appeals over an offense that imposes administrative imprisonment as a penalty; the criteria for determining the admissibility of a complaint in the Court of Appeals have become more refined. The ten-day timeframe for appealing to the court is calculated from the delivery of a reasoned court decision to the parties. The discriminatory 48-hour maximum term of administrative detention has been abolished. It was also clarified that it is illegal to use the maximum term of administrative imprisonment without proper justification and as soon as the grounds for the detention are exhausted, the detainee shall be released immediately, regardless of whether the maximum term of imprisonment has expired or not. A person charged with unlawful use of natural resources not holding a relevant license is no longer deprived of a firearm and a judge reviewing such cases is now entitled to take into consideration different factual circumstances, the personality of the violator or other relevant circumstances and determine an administrative penalty based on thereof. Temporary placement of banners, slogans, and posters on the façade of private property by an owner or with his or her permission during a sponta-

neous protest has become permissible.

It is noteworthy that thanks to the GYLA's litigation, the case-law of the Constitutional Court for the first time has differentiated between serious crimes and other types of offenses. The Constitutional Court held that the misdemeanors for which imprisonment can be ordered are serious crimes, yet the Court did not rule out that other penalties provided for in the Administrative Offenses Code like administrative detention may also reach the degree of intensity of the restriction of the human right that is sufficient for deeming the misconduct a serious crime. The progressive decision of the Constitutional Court secures the ground for the reform of the administrative offenses legislation to be based on this very principle and to introduce appropriate procedural guarantees for serious crimes.

Successfully litigated cases:



The case "Citizen of Georgia David Malania v. Parliament of Georgia" (2018)

The provisions of the Administrative Offenses Code according to which a decision of an administrative body imposing a fine was impossible to appeal in the Court of Appeals were declared unconstitutional.

Winning the case in the Constitutional Court was followed by legislative amendments. As a result, the right to appeal to the Court of Appeals now covers even violations that envisage imprisonment as a sanction. Moreover, the criteria determining the admissibility of a complaint in the Court of Appeals have been clearly defined.



The case "Irakli Khvedelidze v. Parliament of Georgia" (2019)

The provision of the Code of Administrative Offenses according to which the timeframe for appealing a court decision concerning an administrative offense was calculated not from the delivery of the court judgment to a person known as an offender but from the announcement of the operative part of the decision at the court hearing was declared unconstitutional.

Winning the case in the Constitutional Court led to legislative amendments. As a result, the ten-day period for appealing a decision concerning an administrative offense is now calculated from the date of delivery of the court ruling and not from its issuance.



The case “Besik Katamadze, Davit Mzhavanadze and Ilia Malazonia v. Parliament of Georgia” (2019)

The normative content of Article 150 of the Administrative Offenses Code punishing any temporary placement of banners, slogans, and posters on the facade of private property outside the municipality of Tbilisi by an owner or with his/her permission during a spontaneous protest was declared unconstitutional. The judgment of the Constitutional Court was self-executing and did not require any additional legislative changes.



The case “Giorgi Gotsiridze v. Parliament of Georgia” (2020)

The normative content of Article 150² of the Administrative Offenses Code punishing any temporary placement of banners, slogans, and posters on the facade of private property within the Tbilisi municipality by an owner or with his/her permission during a spontaneous protest was declared unconstitutional.

The Constitutional Court accepted the arguments presented by the GYLA and held that the disputed provision was essentially identical to the provision already known unconstitutional (the case “Besik Katamadze, Davit Mzhavanadze and Ilia Malazonia v. Parliament of Georgia”). As a result, the Constitutional Court declared the impugned provision invalid by means of the prevailing norm without holding a merits hearing of the case.



The case “Beknasi” Ltd v. Parliament of Georgia” (2020)

In this case, GYLA disputed the normative content of an Article (Article 57¹) of the Administrative Offenses Code allowing the unconditional, compulsory seizure of the crime weapon as a sanction.

The Constitutional Court upheld the claim, noting that the impugned article did not allow the judge considering the dispute to determine, in each specific case, the need to seize the crime weapon. The judge did not also have the right to take into account different factual circumstances, the personality of the offender or other relevant circumstances and personalize the administrative sanction.



The case “Giorgi Gotsiridze and Vasil Zhizhiashvili v. Parliament of Georgia” (2020)

The Constitutional Court considered the case without a merits hearing. The Court made an important clarification in the ruling, thus achieving the goals of the complaint. According to the Constitutional Court, imposing the maximum term of administrative detention without proper substantiation shall be deemed unlawful. Therefore, once the grounds for the imprisonment are exhausted, the detainee shall be released immediately, regardless of whether or not the maximum period of the detention has expired.²

GYLA hopes that the interpretation offered by the Constitutional Court will facilitate to eradicate the vicious practice of arbitrary arrests, and administrative detention will no longer be used unreasonably for a maximum period of time.



The case “Irakli Jugheli v. Parliament of Georgia” (2020)

In this case, GYLA disputed the possibility to determine different periods of administrative imprisonment during working and non-working hours. The maximum term of administrative detention is 12 hours, yet if the imprisonment coincided with non-working hours, the law provided for the possibility to detain a person suspected of an administrative offense for 48 hours instead of 12 hours.

The Constitutional Court granted the complaint and declared unconstitutional the provision of the Administrative Offenses Code under which a person held for administrative violation can be imprisoned for 48 hours.

The Constitutional Court postponed the annulment of the disputed norm until June 1, 2021, in order to enable the Parliament of Georgia to regulate the matter in accordance with the decision of the Constitutional Court.

² Article 247 of the Administrative Offenses Code determines the period of detention. In particular, it is stipulated that the period of administrative detention of a person committing an administrative offence shall not exceed 12 hours, and if the period of administrative detention coincides with non-working time, the person may be detained and placed in a temporary detention facility until an authorized body hears the case, in which case the total period of detention of the person shall not exceed 48 hours.



What changes can the successful finalization of pending cases in the Constitutional Court entail?

The strategic litigation initiated to amend the law on administrative offenses has proved to be successful, as it has resulted in the gradual invalidation of defective provisions of the Administrative Offenses Code. The current developments suggest that pending cases are going to be eventually upheld.

GYLA believes that granting the pending cases will create an opportunity to reform the legislation on administrative offenses. GYLA challenges the lack of proper procedural guarantees when deliberating offenses of a criminal nature. The current case-law shows that the burden of proof is inadequately distributed when reviewing offenses and the Code does not require the law enforcement to substantiate the grounds for the use of imprisonment. The Code does not either recognize the principle of the presumption of innocence, adversariality of proceedings, and equality of arms as well as the obligation to take decisions beyond a reasonable doubt.

Granting the lawsuits by the Constitutional Court will deprive the Code of Administrative Offenses of the existing procedural basis and the Code in the current form will no longer be applicable. As a result, inevitable preconditions will be created in the Parliament of Georgia to work on the reform of the legislation on administrative offenses.

See the details of pending cases:



The case “Zurab Girchi Japaridze v. Parliament of Georgia”

In the given case, GYLA disputes that, pursuant to the current Code, offenses of criminal nature are reviewed and resolved without proper procedural guarantees. For example, the punishment provided by the articles on petty hooliganism and resistance to a lawful demand of a law enforcement official is severe and equates to the punishment provided for serious crimes, and a person is furnished with fewer procedural protection guarantees during an administrative offense proceeding. The impugned provision does not oblige the judge to substantiate the decision, which means that the ruling delivered by the court, as a rule, does not contain any relevant reasoning as to why the court accepts specific evidence of the guilt of the person held liable on administrative charges and rejects the other.

On December 17, 2019, the Constitutional Court accepted the complaint on the merits. After substantive consideration, the Constitutional Court has to determine whether the appealed article violates the right to a fair trial, as well as whether the disputed article contradicts Article 31, Paragraph 6 of the Constitution of Georgia (no one shall be obliged to prove his or her innocence. The burden of proof shall rest with the prosecutor) and Paragraph 7 (a decision to commit an accused person for trial shall be based on a substantiated belief, and the judgment of conviction - on compelling evidence. Any suspicion that cannot be confirmed in accordance with the procedures provided by law shall be resolved in favor of the defendant).

The successful completion of the complaint will result in the reform of the Administrative Offenses Code of Georgia.



The case “Konstantine Chkheidze v. Parliament of Georgia”

This case also concerns the issue of distribution of the burden of proof in administrative offense cases. With a constitutional complaint, GYLA requests the Court to declare Article 17 of the Administrative Procedure Code and Article 102, Paragraph 1 of the Civil Procedure Code unconstitutional. These provisions regulate the allocation of the burden of proof in administrative and civil disputes between the plaintiff and the defendant. However, as the Code of Administrative Offenses does not define who shall bear the burden of proof in an administrative offense proceeding, the common courts apply the disputed provisions of the Administrative Procedure Code and the Code of Civil Procedure in their practice.

GYLA believes that the use of the disputed articles in administrative offense cases is unconstitutional, as a person charged with administrative violation becomes obliged to present evidence and prove that he or she did not commit an administrative offense. According to GYLA, such redistribution of the burden of proof in cases of violation of the law contradicts Article 31, Paragraph 6 of the Constitution of Georgia, according to which, “no one shall be obliged to prove his or her innocence. The burden of proof shall rest with the prosecutor.”

On November 12, 2020, the Constitutional Court accepted the lawsuit for the merits and merged it with the case of Zurab Girchi Japaridze. The successful completion of the application will result in the reform of the Code of Administrative Offenses.



The case “Natalia Peradze and Konstantine Guruli v. Parliament of Georgia”

In the given case, GYLA disputes the normative content of Article 173 of the Administrative Offenses Code (resistance to a lawful demand of the police), according to which the judge reviewing the case is not required to examine whether the demand of the police officer was lawful. GYLA believes that the above interpretation of Article 173 of the Administrative Offenses Code as it is applied in practice violates the right to a fair trial.

If the complaint is upheld, the arbitrariness of police officers will be restricted and guarantees of protection of the rights of a person charged with an administrative offense will increase.



The case “Konstantine Chachanidze v. Parliament of Georgia”

In the given case, GYLA challenges the normative content of Article 166 (minor hooliganism) of the Administrative Offenses Code according to which abusive language can have no political, cultural, educational, or scientific value. Regardless of the context, the use of such terminology is considered obscene in a blanket manner, thus any use of offensive language in a public place may result in administrative liability under Article 166 of the Administrative Offenses Code.

Granting the complaint will render it impossible to impose administrative punishment on a person under the article of petty hooliganism for using abusive terminology when exercising the right to freedom of assembly and expression.



The case “Bondo Tevdoradze, Anzor Gubaev and Khatuna Beridze v. Parliament of Georgia”

In this case, GYLA disputes Article 77¹, Paragraph 1 of the Administrative Offenses Code with regard to freedom of assembly. The appealed article imposes an administrative penalty for exceeding the permissible ranges of noise. In accordance with the case-law of the common courts, the impugned article prohibits holding an assembly aimed at influencing a public figure by creating discomfort and embarrassment for the said person. Moreover, such assemblies are restricted to be held in a public area located adjacent to the public official’s property or residence. GYLA considers the normative content of the disputed article unconstitutional. GYLA belie-

ves that public officials (politicians, famous individuals), especially when they are performing official duties, have an obligation of tolerance in the event of any interference with their private lives. Furthermore, the purpose of selecting the area around the residence during the protest is to bring the public as close as possible to the private domains of the subject of the protest or solidarity. Only within these conditions, the chances may increase that a public protest will yield any tangible results. Thus, the public should have the right to express its dissatisfaction against any public or political figures in the above-mentioned manner.

If the complaint is granted, the form of the assembly will no longer be considered an offense, nor will result in administrative liability.